

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Telecommunications Relay Services And Speech-to-) CC Docket No. 98-67  
Speech Services for Individuals with Hearing and )  
Speech Disabilities )

To: The Commission

***EMERGENCY PETITION FOR STAY***

**NDS ON VIDEO RELAY SERVICES, INC.**

By \_\_\_\_\_  
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July 20, 2004



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***EMERGENCY PETITION FOR STAY***

Hands On Video Relay Services, Inc. (“Hands On”), by its counsel, and pursuant to FCC Rule Section 1.44, petitions the Commission to Stay the Consumer & Governmental Affairs Bureau’s (“Bureau”) Order, DA 04-1999 (June 30, 2004) (“Rate Order”) lowering the rates paid for Telecommunications Relay Service (“TRS”), including Video Relay Service (“VRS”) for 2004-05. Hands On is separately filing an Application for Review (“Application”) of that order. It is requested that the Commission stay the Rate Order’s effectiveness and thereby leave in effect the rates for TRS and VRS pending Commission resolution of the Application and of the issues relating to VRS raised in the Commission’s June 30, 2004 Order on Reconsideration, FCC 04-137 in this proceeding and CG Docket 03-123. In support, the following is shown:

***I. Introduction.***

The Commission plainly has sufficiently broad authority to permit the issuance of a stay to maintain the status quo while it exercises its jurisdiction. *United State v. Southwestern Cable Co.*, 392 U.S. 157, 167-81 (1967); *Midwest Television, Inc.*, 8 Rad Reg. 2d (P&F) 278 (1966); 47 U.S.C. Sec. 154(i). This is a case requiring exercise of that authority.

In evaluating a request for stay, the Commission must balance four factors. (1) the likelihood of success on the merits; (2) the existence of irreparable harm; (3) the likelihood of harm to third

parties; and (4) the public interest. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 438 (1977). Consideration of those four factors in this case plainly warrants issuance of a stay of the Bureau's Rate Order.

***II. Hands On has shown a strong case that it is likely to prevail on the merits.***

As stated above, Hands On has filed an Application for Review of the Bureau's Rate Order. That Application is hereby incorporated by reference herein and is attached hereto as Exhibit I. Review of that Application shows that Hands On has made a strong showing on the merits and is likely to prevail.

The basis of Hands On's Application is as follows. First, as the Rate Order itself admits, the methodology NECA used in formulating its rate recommendation was flawed and violated FCC Rule Part 65's methodology. Thus, it is without question that NECA recommended and the Bureau adopted inadequate TRS rates. Second, even while acknowledging that it must compile additional data to arrive at fair TRS compensation rates, the Rate Order still fails to comply with Part 65's methodology for calculating a rate of return on investment because its working capital component is substantially understated. Third, the Rate Order totally failed to acknowledge significant evidence of NECA's arbitrary and capricious treatment of provider costs as evidenced by Hands On's open discussion of adjustments NECA made to its costs that were on their face irrational, which NECA refused to explain, or which were made in direct contradiction to the procedure NECA claimed to have followed in reviewing provider cost data. Fourth, although the Rate Order holds out the promise of meetings with the Bureau to dispute any erroneous adjustments NECA might have made, such meetings fail to offer any meaningful opportunity to contest NECA's adjustments since NECA failed either to delineate its adjustments in its submission -- indeed NECA even admitted it had not

adequately explained those adjustments -- and NECA never even advised the Bureau of the specific adjustments made. Fifth, the Rate Order admits it is predicated on the Bureau's view that the rate for VRS is irrelevant to concerns about the quality of the service itself.<sup>1</sup> Such a callous disregard of the interests of deaf/hard of hearing and speech disabled persons requires this Commission to step in and correct the Bureau's erroneous course.

***III. Irreparable harm will result unless the Commission stays the Bureau's Rate Order.***

This situation presents an emergency warranting immediate Commission action in the nature of a stay because of the likelihood of irreparable harm to deaf/hard of hearing and speech disabled consumers.<sup>2</sup> This is because the Bureau admits that the TRS rates set in the Rate Order fail to compensate adequately providers for the costs of TRS. *Rate Order* at para. 38 . In fact, as we show in the Application, the Bureau understates significantly the degree to which the Rate Order

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<sup>1</sup> Although the Rate Order is flawed with respect to the determination of each TRS rate, this petition concentrates on issues relating to VRS. It is VRS service quality which has most suffered from the cuts in TRS rates and it is VRS service quality problems which have generated the overwhelming number of consumer complaints, more than 1,000 in the docket of this proceeding.

<sup>2</sup> Service providers have standing to contest the denial of rights of their customers. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972). Individual VRS customers lack the resources to seek meaningful redress of their grievances with the Bureau's Rate Order. In any event, it is Hands On's understanding that certain deaf/hard of hearing and speech disabled consumer groups intend to seek review and stay of the Bureau's Rate Order as well.

inadequately compensates TRS providers. That being the case, TRS providers have no choice but to degrade their service or suffer financial loss. Plainly it is the former that will occur. Indeed, it has already occurred.

Since the Bureau cut the VRS payment rate some 55 percent to \$7.751 with less than 12 hours notice, effective July 1, 2003, significant portions of the deaf/hard of hearing and speech disabled community have been denied the functionally equivalent TRS service Section 225 of the Communications Act of 1934, as amended, requires. This portion of the deaf/hard of hearing and speech disabled community are those hundreds of thousands of persons for whom American Sign Language is their primary means of communication. They have been denied functionally equivalent telecommunications service because the VRS payment rate of \$7.751 was inadequate to allow providers to provide quality, on demand, 24 hour VRS service. Prior to July 1, 2003, deaf/hard of hearing and speech disabled persons had available 24 hour service, seven days a week. Following the rate cut, 24 hour service was eliminated. It has not returned. Prior to July 1, 2003, deaf/hard of hearing and speech disabled persons could access VRS with a wait time averaging no more than 20 seconds. Following the rate cut, wait times ballooned to several minutes, and sometimes are as long as 20-30 minutes.<sup>3</sup> Prior to July 2003, VRS providers and carriers were making significant efforts to improve their product, including the video codec so that deaf consumers could be assured high quality video service on par with high quality audio service hearing persons receive over the public

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<sup>3</sup> Hands On's wait times have consistently averaged more than a minute since July 1, 2003, sometimes much more than a minute. Anecdotal evidence, both of record and not of record in this proceeding, indicates that certain other providers have much longer wait times.

switched telephone network (“PSTN”).<sup>4</sup> Since July 2003, technological improvement has been largely stymied because providers lack sufficient funds to devote toward the improvement of the service.

The degradation in VRS quality has not gone unnoticed by the deaf/hard of hearing and speech disabled community VRS serves. Since the Bureau’s June 30, 2003 Interim Rate Order dropped the VRS rate to \$7.751 this docket has seen some 1,100 public comments. Virtually all of those comments have informed the Commission of the tremendous utility to deaf/hard of hearing and speech disabled persons of VRS, and have implored the Commission to provide adequate funding for the service. Some 800 of those public comments have come since NECA recommended on May 3, 2004, dropping the VRS rate to \$7.293 -- a recommendation NECA’s own TRS Advisory Council disavowed. Those 800 public comments since May 3, 2004, are virtually unanimous in begging the Commission not to reduce further the VRS rate in light of the serious service degradation VRS consumers have faced. Those public comments include submissions from the major deaf/hard of hearing and speech disabled consumer organizations, including TDI, Inc., National Association of the Deaf, Registry of Interpreters for the Deaf, and Norcal Center on Deafness, as well as a

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<sup>4</sup> The free NetMeeting software, a Microsoft product, is hopelessly outdated and inadequate to provide sufficient frames per second to achieve quality video relay service. In fact, Microsoft has ceased development and support of that software. *See* Network World Fusion, *In Brief: Microsoft drops gavel on NetMeeting* (Dec. 1, 2003) ([www.nwfusion.com/news/2003/1201page6briefs.html](http://www.nwfusion.com/news/2003/1201page6briefs.html)); PC World, *Microsoft Retires NetMeeting* (Nov. 25, 2003) ([www.pcworld.com/news/article/0,aid,113659,tk,dn112503x,oo.asp](http://www.pcworld.com/news/article/0,aid,113659,tk,dn112503x,oo.asp)). Moreover, NetMeeting has difficulty penetrating firewalls. *See A Primer on using Microsoft NetMeeting* ([www.wamware.com/tresources/netmeeting/primer.htm](http://www.wamware.com/tresources/netmeeting/primer.htm)). That is why Sorenson uses its EnVision software, and Hands On employs its VideoSign software, both of which offer superior video quality compared to NetMeeting. NetMeeting also does not allow a sufficient number of frames per second to provide the full motion video necessary for reading finger spelling and conversing in ASL at conversational speeds, nor does NetMeeting allow a full screen picture.,

multitude of submissions from individual deaf persons. Those public comments are predicated on one simple fact. If the VRS service provided at \$7.751 was inadequate, lowering the VRS payment rate to \$7.293 will only make the service worse. These public commenters in essence are calling on this Commission to perform a reality check.

This Commission must perform a reality check since NECA and the Bureau were either unwilling or unable to do so. If this Commission is truly concerned with providing the deaf/hard of hearing and speech disabled community with VRS that is functionally equivalent with the phone service provided hearing persons, it will conduct a full review of the 2004-05 VRS rate, and will increase that rate to a level that will in fact provide adequate, functionally equivalent VRS service.

Although the Bureau may shrug degraded VRS service off as irrelevant since VRS is not a mandatory service, *see Rate Order* at para. 46, we do not think this Commission should so lightly condemn the hundreds of thousands of deaf/hard of hearing and speech disabled persons for whom their primary language is American Sign Language to second rate telecommunications.

Imagine a deaf mother in Cincinnati with a sick child in the middle of the night trying to call her doctor's answering service. She cannot do that with VRS because no VRS provider has service after midnight central time. Imagine a deaf lawyer attempting to join a conference call to negotiate a contract, but he cannot get a video interpreter because of a long wait time. His only alternative is text-relay where the minimum typing speed of 60 words per minute. Because of that and because of the lack of duplex communications, the call drags on for several hours to the frustration of all concerned. A VRS call, however, could take place in normal time. Imagine a deaf small child of a divorced couple who misses his father, but cannot type, VRS is his only connection, yet he has to sit



by the video terminal for up to 20 minutes to call his dad because VRS providers lack sufficient funds to hire enough video interpreters.

The more than 1,000 comments the Commission has received from deaf/hard of hearing and speech disabled persons as well as the views of House Commerce Committee Chairman Joe Barton and Communications Subcommittee Chairman Fred Upton (*see* Exhibit II, hereto), pleading with the FCC not to allow further degradation of VRS service are telling reminders that real people depend on VRS to communicate with their families, to do their jobs and to be full members of society. Continued degradation of VRS service to deaf/hard of hearing and speech disabled persons represents an immediate, concrete harm to those persons least able to shoulder that harm. That harm is irreparable since it is a denial of telecommunications service. Given that irreparable harm, an immediate stay of the reduction of the TRS rates is warranted to maintain the status quo to prevent further injury to deaf/hard of hearing and speech disabled consumers of TRS/VRS while the Commission considers the myriad of issues concerning VRS payment now before it.

***IV. No irreparable harm is threatened to third parties.***

Grant of a stay in this case will not be injurious to third parties. The only potential injury faced by third parties is that if the appropriate VRS rate is less than the \$8.854 rate the Commission set in its 2003-04 Rate Reconsideration Order, rate payers will pay slightly more into the Interstate Telecommunications Fund until the Commission resolves this proceeding. However, any such overpayment into the fund can be adjusted when the Commission makes its final determination on 2004-05 rates. Thus, there is no possibility of irreparable harm.

***V. The public interest favors grant of a stay of the Bureau's Rate Order.***

The public interest clearly favors grant of a stay in this instance. It is the policy of the United States, expressed through Section 4 of the Americans With Disabilities Act, Section 225 of the Communications Act of 1934, as amended, to provide functionally equivalent telecommunications service to the deaf/hard of hearing and speech disabled population of this country. Among other beneficial results of that policy is to facilitate the full employment of the deaf/hard of hearing and speech disabled, so that they can be contributors to the economy rather than accept a role of dependency. Functionally equivalent VRS facilitates that goal. Adequate VRS compensation is the only way to achieve VRS service functionally equivalent to that which hearing persons take for granted. The public interest thus plainly favors grant of a stay to prevent further degradation of VRS service.

***VI. Grant of a stay is plainly warranted.***

It is readily apparent that serious deficiencies exist with the 2004-05 VRS rate NECA proposed and the Bureau adopted. From merely a reality check standpoint, the Commission must closely review the Bureau's rubber stamping of NECA's proposed VRS rate since it proposes to decrease the VRS rate for 2004-05 in the face of clear and convincing evidence that the previous 2003-04 higher interim compensation rate of \$7.751 was inadequate to provide deaf/hard of hearing and speech disabled persons with functionally equivalent telecommunications service. NECA's own TRS Advisory Council so concluded in unanimously rejecting the proposed rate in its April 2004 meeting, a fact the Bureau's Rate Order never even mentioned or considered.

For all of these reasons, the Commission must step in on an emergency basis, and hold the TRS rates at the 2003-04 level pending resolution of the issues now under consideration with respect

to TRS compensation in CG Docket 03-123, and raised with respect to the Bureau's adoption of NECA's 2004-05 recommended TRS rates in this docket.

Each of the traditional elements supporting issuance of a stay are present in this case: (1) the likelihood of success on the merits; (2) irreparable harm to deaf/hard of hearing and speech disabled persons; (3) the lack of substantial harm to third parties; (4) and the public interest in not further degrading service to deaf/hard of hearing and speech disabled persons. Accordingly, the Commission should stay the Bureau's Rate Order pending resolution of the issues extant in this proceeding and CG Docket 03-123 concerning VRS funding.

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Respectfully submitted,

**HANDS ON VIDEO RELAY SERVICES, INC.**

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*Certificate of Service*

I, George L. Lyon, Jr., do hereby certify that I have caused copies of the foregoing Emergency Petition for Stay to be served on the following persons via first-class mail, except where noted, postage pre-paid on July 16, 2004:

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**/s/**

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**George L. Lyon, Jr.**

## **EXHIBIT 1**

**(Application for Review)**



## **EXHIBIT II**

**(Letter from Chairman Barton and Subcommittee Chairman Upton)**